

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 01-02-024
(Filed February 21, 2001)

Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Loops in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 01-02-035
(Filed February 28, 2001)

Application of The Telephone Connection Local Services, LLC (U 5522 C) for the Commission to Reexamine the Recurring Costs and Prices of the DS-3 Entrance Facility Without Equipment in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-031
(Filed February 28, 2002)

Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Interoffice Transmission Facilities and Signaling Networks and Call-Related Databases in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-032
(Filed February 28, 2002)

Application of Pacific Bell Telephone Company (U 1001 C) for the Commission to Reexamine the Costs and Prices of the Expanded Interconnection Service Cross-Connect Network Element in the Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-034
(Filed February 28, 2002)

Application of XO California, Inc. (U 5553 C) for the Commission to Reexamine the Recurring Costs of DS1 and DS3 Unbundled Network Element Loops in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-03-002
(Filed March 1, 2002)

ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENTS ON REMAND OF THE SHARED AND COMMON COST MARK-UP

I. Summary

In light of a draft decision in this proceeding that is currently on the Commission's agenda for its August 22, 2002 meeting, this ruling acts in advance of Commission approval of that item in order to avoid delay in addressing a

remand ordered by the U.S. District Court for the Northern District of California in *AT&T Communications of California Inc. et al., v. Pacific Bell Telephone Company, et al.* (Order on Cross Motions for Summary Judgment, No. C 01-02517 (CW) (N.D. Cal. August 6, 2002) (“Remand Order”). This ruling is issued for the purpose of initiating the adjustment directed by the Court’s Remand Order, and it solicits comments from the parties on several issues, including the appropriate methodology to correct the double-counting error found by the Court.

II. Background

In Decision (D.) 99-11-050,¹ the Commission adopted prices for the unbundled network elements (UNEs) that Pacific Bell Telephone Company (Pacific) sells to competitors who use portions of its network. One aspect of the prices adopted in that order involved a percentage mark-up over the forward-looking cost of UNEs to recover Pacific’s “shared and common costs.”² The Commission adopted a mark-up percentage of 19% based on a calculation of Pacific’s shared and common costs divided by the total direct costs of UNEs and total non-recurring costs of UNEs.³ (D.99-11-050, mimeo. at 72, and 257.)

¹ D.99-11-050 was issued in the Commission’s Rulemaking and Investigation to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture and Development of Dominant Carrier Networks (Rulemaking 93-04-003/Investigation 93-04-002) (“OANAD proceeding”).

² Shared and common costs are defined in Appendix C of D.95-12-016. According to page 6 of Appendix C, shared costs are defined as “costs that are attributable to a group of outputs but not specific to any one within the group, which are avoidable only if all outputs within the group are not provided.” Common costs are defined as “costs that are common to all outputs offered by the firm.”

³ Specifically, the Commission stated that the \$996 million total of shared and common costs for all UNEs should be divided by the sum of (a) the total direct TELRIC costs for

Footnote continued on next page

In the fall of 2001, AT&T Communications of California, Inc., MCI Worldcom Network Services, Inc. and MCImetro Access Transmission Services LLC (jointly “Plaintiffs”) filed a suit in U.S. District Court seeking to overturn aspects of D.99-11-050 related to the shared and common cost mark-up. Plaintiffs argued that the Commission improperly determined Pacific’s firm-wide shared and common costs and unreasonably allocated these costs only to UNEs. In a cross-motion, Pacific argued, among other things, that the Commission had double-counted non-recurring costs in its calculation of the shared and common cost mark-up. Specifically, Pacific claimed that it had originally included an estimate of UNE non-recurring costs of about \$583 million in its initial UNE cost studies that resulted in the UNE cost total of \$4.814 billion. Pacific claimed that the \$375 million non-recurring cost amount used in the denominator of the mark-up calculation should have been substituted for the \$583 million estimate.

On August 6, 2002, the U.S. District Court issued its Remand Order in *AT&T v. Pacific Bell*. The court denied all of Plaintiffs’ claims and denied all but one of Pacific’s claims. The court agreed with Pacific that the Commission had double-counted non-recurring costs when it calculated Pacific’s total direct costs of UNEs. Specifically, the court concluded that the Commission had failed to remove Pacific’s original \$583 million estimate of non-recurring costs when it added \$375 million to Pacific’s cost of providing UNEs. In effect, the court found that the denominator of the mark-up calculation was inflated. The order states, “The [Commission’s] determination of Pacific’s direct cost of providing UNEs

all UNEs of \$4.814 billion (as approved in D.98-02-106 and related compliance filings), plus (b) total non-recurring costs of \$375 million (adopted in D.98-12-079).

(the denominator of the common cost markup), and any decision which relies on this determination, must be vacated and remanded, so that the double-counting can be remedied.” (*AT&T v. Pacific Bell*, slip op. at 38.)

III. Comments Requested

In light of the Court’s Remand Order, and the draft order on the Commission’s August 22, 2002 Public Meeting Agenda which directs the solicitation of comments on this issue in the above-captioned proceeding, this ruling is issued today to initiate the adjustment directed by the Court’s Remand Order and avoid any unnecessary delay in review of the shared and common cost mark-up.⁴

Parties should file and serve comments on how the Commission should proceed given the Remand Order. Specifically, parties should comment on:

1. What is the correct methodology to adjust the denominator of the mark-up calculation, given the Court’s finding that D.99-11-050 double-counted non-recurring costs?
 - a. Should the Commission subtract \$583 million from the denominator of the mark-up formula used in D.99-11-050? (*See* Conclusion of Law 19, p. 257.)⁵

⁴ In the event that the Commission does not adopt the draft order (Item 8) at its August 22, 2002 meeting as drafted, a subsequent ruling will notify parties how to proceed.

⁵ If the \$583 million were subtracted from the denominator, the shared and common cost mark-up would increase to 22%. (\$996 million divided by (\$4.814 + \$375 million - \$583 million) equals 21.6%, which is rounded to 22%.)

- b. Are there other methodologies or factors, which are contained within the original record supporting D.99-11-050, that the Commission should consider when adjusting the mark-up calculation in response to the Remand Order?

2. The Remand Order states that “any decision which relies on [the total direct cost of providing UNEs] must be vacated and remanded, so that the double-counting can be remedied.” What decisions would the Commission need to vacate and adjust in order to comply with this directive, and how should the Commission proceed once these decisions are identified?
3. To comply with the Remand Order, should the Commission adjust the mark-up calculation on a retroactive basis (i.e., based on the effective date of D.99-11-050), or only on a prospective basis? If the Commission determines that a retroactive adjustment is appropriate, under what terms should carriers make any payments owed to Pacific (i.e., one-time payment or otherwise)?

Responses to the above questions should be filed and served no later than August 28, 2002. Parties may file reply comments no later than September 4, 2002. In addition to the normal process for filing and service of comments, a copy of all filings should be sent electronically to the service list for this consolidated proceeding and to ALJ Dorothy Duda at dot@cpuc.ca.gov.

IT IS RULED that:

1. Parties should file and serve responses to the questions set forth in this ruling no later than August 28, 2002.
2. Parties may file and serve reply comments no later than September 4, 2002.
3. A copy of all filings should be sent electronically to the service list and to the Administrative Law Judge as set forth above.

Dated August 15, 2002, at San Francisco, California.

/s/ DOROTHY J. DUDA

Dorothy J. Duda

Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Requesting Comments on Remand of the Shared and Common Cost Mark-Up on all parties of record in this proceeding or their attorneys of record. In addition, service was also performed by electronic mail.

Dated August 15, 2002, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.